

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #01-95

SUMMARY/RESPONSE TO COMMENTS FROM THE THIRD COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 1, 2003, through February 21, 2003, on the preliminarily adopted rule concerning amendments to 327 IAC 15-5 and 327 IAC 15-6 regarding storm water run-off associated with construction activity and storm water discharges associated with industrial activity and the repeal of 327 IAC 15-5-11. IDEM received comments from the following parties during the comment period:

AgBest, Phil Zimmerman, Agronomy Manager (AgB)
Agribusiness Council of Indiana, Cresswell Hizer, CEO (ACI)
Excell Co-op, Steve Salmon, Risk Coordinator (ExC-SS)
Excell Co-op, Mike Titus, Risk Coordinator (ExC-MT)
Fulton-Marshall Farm Bureau Cooperative Association, Inc, Barry Day, (FMFB)
Growers Co-op, Joe Hill, Risk Coordinator (GCJH)
Growers Co-op, James Mishler, Branch Manager (GCJM)
Growers Co-op, Elizabeth Smith, Agronomist (GCES)
Growers Co-op, Larry Tempel, Agronomy Manager (GCLT)
Growers Co-op, Jeff Trimble, Marketing Agronomist (GCJT)
Growers Co-op, Daniel Weber, General Manager (GCDW)
Indiana Farm Bureau, Chad Frahm, Staff Attorney (IFB)
Indiana Rertilizer Advisory Board, Joseph Russell, Chairman (IFAB)
Westland Co-op, Jeffrey Troike, President (WC)
White River Coop, Leroy Strup, Risk Coordinator (WRC)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Agricultural facilities involved in the storage and handling of undivided quantities of fertilizers and pesticides are currently subject to 355 IAC 2 and 355 IAC 5, existing storage and containment rules for bulk fertilizers and pesticides promulgated and enforced by the Office of the Indiana State Chemist (OISC). These rules are specifically designed to eliminate exposure of storm water to industrial activities. It appears to be more efficient, effective, and practical to allow the inspectors of the state chemist's office to continue their periodic site inspections and enforcement of the current containment rules because these inspectors are more familiar with our business operations and individual site activities. The current system of inspection and enforcement along with significant best management practices, without duplication by IDEM's Rule 6, is the best approach to preventing detrimental impacts to Indiana's waters. The state chemist's inspectors should report egregious violation to IDEM only after a violator has failed repeated warnings to achieve compliance. (AgB, ExC-SS, ExC-MT, FMFB, GCJH, GCJT, GCDW)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: The members of the Indiana Plant Food and Agricultural Chemicals Association request exclusion from the proposed requirements of Rule 6. The tanks and associated operating equipment used in the storage and distribution of fertilizers for farming are designed and rigorously maintained to prevent the release of fertilizer to the environment. Storage and handling operations are thoroughly regulated by the OISC. For example, secondary containment of above ground liquid fertilizer tanks is required, and any storm water collected in the containment area must be tested prior to discharge. If the collected storm water is contaminated, it must be disposed in accordance with IDEM regulations. Containment is also required for fertilizer truck loading areas; many of these loading areas are covered by roofs to prevent entry by precipitation. These existing regulations are sufficient, and additional regulation by Rule 6 is unnecessary. (ACI)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: Regulation by two agencies to accomplish the same end result should not be necessary. Westland Co-op has invested over a half million dollars in containment and loading structures to meet the necessary requirements to protect our environment from accidental releases that would result in contaminated storm water run-off. Our co-op also conducts employee training and has a strict housekeeping program to enhance the investments that have been made to the facilities. Rule 6 regulations are not necessary in the case of Westland Co-op since it is complying with the OISC regulations that prevent contaminants from being a pollution run-off source. (WC)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: White River Coop has made many operational changes to safeguard the environment. Agricultural supply dealers are in a market that is shrinking, both in volume and margins, and, in some cases, are competing against large farmers who are not always in compliance. Additional regulatory costs do not help to level the competitive marketing field. (WRC)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: Agriculture is a very seasonal business. There are many months of the year when virtually no activity occurs at a fertilizer facility. Over eighty percent (80%) of the products

handled and distributed in a calendar year may occur in as little as ninety (90) working days. Therefore, no potential for storm water contamination occurs for much of the year. Agricultural facilities should be excluded from Rule 6. (GCJH, GCES, GCLT, GCJT, GCDW)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: Indiana Farm Bureau is concerned that 327 IAC 15-6-2(a)(5)(I) will subject a multitude of on-farm fertilizer and pesticide storage facilities that are already regulated by the OISC to additional requirements only to address a few, limited circumstances rather than a chronic, statewide problem. The rule language currently in the preliminarily adopted rule is not the same language that was in Rule 6 when it was on public notice of second comment period. The second notice rule language referred to facilities that are classified as SIC code 5191 (farm supplies) and included only those portions of the facility that are involved in the material handling of agricultural chemicals (chemical fertilizers and pesticides) or that otherwise are required to comply with the rule. No official comments to this language were submitted to IDEM during the second comment period. At a meeting in May 2002 between IDEM and Indiana Farm Bureau, IDEM gave assurance that on-farm fertilizer or pesticide storage was not to be included under the requirement of 327 IAC 15-6-2(a)(5)(I). At some time between second notice and preliminary adoption and for reasons unstated by IDEM, this portion of Rule 6 was changed to its current wording which removes the word “wholesale”, a reference to SIC code 5191, and lists storage capacity criteria that the OISC regulates. This changed wording will cause a multitude of on-farm fertilize and pesticide storage facilities to be regulated under this rule thereby imposing additional requirements and costs on Indiana farmers and duplicating the work of the OISC. Fertilizers and pesticides are typically transferred in and out of storage only a few times a year and are most effectively used and most environmentally safe when used at the right time and in the right conditions. Being able to store these products on-farm helps Indiana farmers not only save money but also be better stewards of the environment. If storm water management at on-farm facilities is a chronic problem in Indiana, the OISC should be the state agency responsible for its regulation. In what way does IDEM find the regulatory ability of the OISC to be lacking in regard to fertilizer and pesticide storage and handling? The following recommendations should be considered for modifying Rule 6: (1) entirely delete 327 IAC 15-6-2(a)(5)(I); (2) exempt facilities that are covered by bulk storage and containment rules administered by OISC; (3) exempt facilities that do not distribute but use fertilizer or pesticide for on-farm use only; and (4) replace “transfer and storage” with “distribution” so that clause (I) begins: “Facilities, that are involved in the processing and distribution of agricultural chemicals...”. (IFB)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities. The term “distribution” has been worked into clause (I) as a modifier to “facilities”, and, as with the draft rule language at second notice, the agricultural facilities considered under

this rule are still limited to only those portions of the facility that are involved in the material handling and storage of agricultural chemicals.

Comment: Any facility, including bulk fertilizer and pesticide facilities, that is engaged in activities that have a demonstrated detrimental impact on waters of the state should be included in the scope of Rule 6 if those activities are not already adequately regulated elsewhere. Given the existing regulation of these facilities by the OISC, it is unclear how bringing these facilities into a regulatory permitting program will improve environmental protection intended by the proposed Rule 6. Exemption from Rule 6 should be given to fertilizer and pesticide storage facilities that are covered by the bulk storage and containment rules. At a minimum, an exemption for these facilities should be given until such time that a clear threat from their activities can be demonstrated or effectively measured. (IFAB, IFB)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: The Indiana Fertilizer Advisory Board is concerned that there appears to be no clear method established to measure the success or failure of the environmental safeguards proposed by Rule 6. IFAB is unaware of the specifics of any water quality problems that may have resulted from storage and handling practices at fertilizer or pesticide facilities. (IFAB, IFB)

Response: As noted before, the rule has been revised to exclude agricultural facilities unless there is a discharge or a clear threat to discharge. IDEM will defer to OISC regulations and oversight. IDEM remains concerned about historical contamination at many agricultural chemical facilities and is also working with OISC and the industry to implement effective “best management practices” to supplement existing oversight to improve future practices.

Comment: How will sampling be conducted at farm facilities regulated under Rule 6? IFB is concerned that IDEM will demonstrate a violation of Rule 6 by targeting small depressions of water at the facility that do not threaten waters of the state. (IFB)

Response: As noted before, the rule has been revised to exclude agricultural facilities unless there is a discharge or a clear threat to discharge. In this instance, IDEM would pursue an NPDES permit if there is a water quality standards violation due to a discharge or a clear threat of such a violation before requiring applicability to the rule.

Comment: Rule 6 as proposed would require many Indiana fertilizer facilities to obtain NPDES permits for storm water run-off. This would present the fertilizer facilities with an additional regulatory and administrative burden without providing a commensurate increase in environmental protection. The proposed Rule 6 with its redundant regulatory requirements that will be among the most stringent in the nation will make it difficult for Indiana agribusiness to compete with their counterparts in other states. The Indiana agricultural economy has been depressed over the past several years and it does not need another expensive regulation to further harm the industry. Furthermore, this rule will be very expensive for the state to implement and enforce and will do increased harm to a state already in budgetary crisis. (ACI, GCLT)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general

NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: It has become abundantly clear through meetings between the Growers Co-op and IDEM held since December, 2002 that no serious consideration has been given to the substantial financial investment already made by the agricultural industry on environmental improvements. The industry continues to make facility improvements to further protect the environment in a variety of ways, including additional impervious surfaces at dry fertilizer transfer points and serious consideration for future construction of roofs or enclosed structures at operational pads and transfer points. Further regulatory compliance expense could prove disastrous to many agricultural businesses. It has been estimated that as many as one-third of the retailer facilities could go out of business if confronted with Rule 6 compliance. (GCJH, GCJM, GCES, GCJT, GCDW)

Response: As noted before, IDEM has removed agricultural chemical facilities from applicability of Rule 6 except for instances of a discharge or clear threat to discharge. IDEM has listened to concerns from the industry and worked closely with the OISC and the industry to ensure that effective procedures will be in place to safeguard water quality due to potential problems associated with these facilities.

Comment: Forcing Rule 6 on agricultural fertilizer handling facilities will close up to one-half of the facilities. This will cause increase rural unemployment and a reduction of taxes to local governments. Increased environmental exposure to fertilizer contamination will result from increased trucking, and increased trucking will mean more fuel consumption and wear and tear on roads and a greater possibility of vehicular accidents. (GCLT)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities. Therefore, the fiscal impact to the industry will be minimal except for specific facilities that may have discharges to the waters of the state or a clear threat to discharge. The applicability of Rule 6 in those situations would not differ substantially from the results of an enforcement action by IDEM in the event of such a discharge or threat to discharge.

Comment: Growers Co-op has spent one and a half million dollars at our facilities in four counties in the past ten years to ensure meeting or exceeding regulations related to storage and handling of fertilizer and fuels. The cost of insurance (medical and casualty) as well as loss of gross margins has forced the elimination of some facilities and jobs. Twenty-four positions have been eliminated in the past three years. If forced to spend thousands of dollars more towards compliance with Rule 6, more job consolidation will be necessary. (GCDW)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities. Therefore, the fiscal impact to the industry will be minimal except for specific facilities that may have discharges to the waters of the state or a clear threat to discharge. The applicability

of Rule 6 in those situations would not differ substantially from the results of an enforcement action by IDEM in the event of such a discharge or threat to discharge.

Comment: The proposed Rule 6 contains a provision for a conditional no exposure exclusion for facilities that do not have storm water contamination issues. However, the requirements to qualify for this exclusion are so complicated, unwieldy and unreasonable that they fail to provide an adequate alternative. The conditional no exposure exclusion section should be simplified. (ACI)

Response: In the event that an agricultural facility has been required to obtain an NPDES permit, the rule provides the opportunity to take advantage of the same “no exposure exclusion” as for all other industrial sectors.

Comment: Rule 6 will call on agricultural dealers to spend thousands of dollars per location to possibly make some locations exempt. If a location cannot qualify for exemption, it may be forced to close which could be a hardship on some local farmers that may have to travel great distances to get supplies. (WRC)

Response: IDEM has made revisions to remove agricultural chemical facilities from automatic applicability under Rule 6. Instead, the rule cites existing authority to require an NPDES permit for an agricultural chemical distributor in the event of a discharge or clear evidence of a potential discharge. Instead of the requirement to comply with the Rule 6 general NPDES permit, IDEM is working with the OISC to ensure that procedures and regulations are in place so the OISC can provide proper oversight relative to water quality at agricultural chemical facilities.

Comment: 327 IAC 15-6-12 concerning the conditional no exposure exclusion should reference the 355 IAC 2 and 355 IAC 5 rules of the OISC as a method by which an agricultural facility could claim the no exposure exclusion. Language capturing the following is suggested for inclusion into 327 IAC 15-6-12(a)(7): “At a dry fertilizer transfer point that has concrete or other approved impervious surface in place, good housekeeping practices may serve as an adequate protection to surface water impact. Curbing of such operational areas should also be considered adequate to protect storm water from measurable impact of fertilizers. A roof constructed over such areas to limit storm water impact when combined with good housekeeping practices should be adequate as well.”. (GCJH, GCJT, GCDW)

Response: The revised rule excludes agricultural facilities unless a specific determination is made that there has been a discharge or a clear threat to discharge. In those instances, it makes sense to have procedures in place that are comparable with other regulated industrial sectors for obtaining a no exposure exclusion.